



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R06-OAR-2014-0378; FRL-9926-93-Region 6]

Approval and Promulgation of Implementation Plans; Arkansas; Prevention of Significant Deterioration; Greenhouse Gas Plantwide Applicability Limit Permitting Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve one revision to the Arkansas State Implementation Plan (SIP) submitted by the Arkansas Governor to the EPA on January 7, 2014. This submittal revises the Arkansas Prevention of Significant Deterioration (PSD) Permitting Program to incorporate by reference federal plantwide applicability limit (PAL) permitting provisions to enable the State of Arkansas to issue PSD PALs to sources with greenhouse gas (GHG) emissions. The EPA is proposing to find that the January 7, 2014 revision to the Arkansas SIP is consistent with federal requirements for PSD permitting. The EPA is also proposing ministerial changes to the Code of Federal Regulations (CFR) to reflect recent EPA SIP approvals to the Arkansas PSD program and to show that SIP

deficiencies identified in prior partial disapprovals have been addressed. We are proposing this action under section 110 and part C of title I of the Clean Air Act (CAA or the Act).

DATES: Written comments should be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Submit your comments, identified by Docket No. EPA-R06-OAR-2014-0378, by one of the following methods:

- *www.regulations.gov*: Follow the on-line instructions.
- E-mail: Ms. Adina Wiley at wiley.adina@epa.gov.
- Mail or delivery: Ms. Adina Wiley, Air Permits Section (6PD-R), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202-2733.

Instructions: Direct your comments to Docket ID No. EPA-R06-OAR-2014-0378. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information the disclosure of which is restricted by statute. Do not submit information through <http://www.regulations.gov> or e-mail, if you believe that it is CBI or otherwise protected from disclosure. The <http://www.regulations.gov> website is an “anonymous access” system, which means that the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to the EPA without going through <http://www.regulations.gov>, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket

and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment along with any disk or CD-ROM submitted. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters and any form of encryption and should be free of any defects or viruses. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

Docket: The index to the docket for this action is available electronically at www.regulations.gov and in hard copy at EPA Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available at either location (e.g., CBI).

FOR FURTHER INFORMATION CONTACT: Ms. Adina Wiley, (214) 665-2115, wiley.adina@epa.gov. To inspect the hard copy materials, please schedule an appointment with Ms. Adina Wiley or Mr. Bill Deese at (214) 665-7253.

SUPPLEMENTARY INFORMATION: Throughout this document wherever “we,” “us,” or “our” is used, we mean the EPA.

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I. Background

The Act at section 110(a)(2)(C) requires states to develop and submit to the EPA for approval into the state SIP, preconstruction review and permitting programs applicable to certain new and modified stationary sources of air pollutants for attainment and nonattainment areas that cover both major and minor new sources and modifications, collectively referred to as the New Source Review (NSR) SIP. The CAA NSR SIP program is composed of three separate programs: Prevention of Significant Deterioration (PSD), Nonattainment New Source Review (NNSR), and Minor NSR. PSD is established in part C of title I of the CAA and applies in areas that meet the National Ambient Air Quality Standard (NAAQS) – “attainment areas” – as well as areas where there is insufficient information to determine if the area meets the NAAQS – “unclassifiable areas.” The NNSR SIP program is established in part D of title I of the CAA and applies in areas that are not in attainment of the NAAQS – “nonattainment areas.” The Minor NSR SIP program addresses construction or modification activities that do not emit, or have the potential to emit, beyond certain major source thresholds, and thus do not qualify as “major,” and applies regardless of the designation of the area in which a source is located. The EPA regulations governing the criteria that states must satisfy for EPA approval of the NSR programs as part of the SIP are contained in 40 CFR sections 51.160 - 51.166.

A. Summary of the EPA’s Tailoring Rule and GHG PALs Rule

On June 3, 2010, the EPA issued a final rule, known as the Tailoring Rule, which phased in permitting requirements for GHG emissions from stationary sources under the CAA PSD and title V permitting programs (75 FR 31514). For Step 1 of the Tailoring Rule, which began on

January 2, 2011, PSD or title V requirements applied to sources of GHG emissions only if the sources were subject to PSD or title V “anyway” due to their emissions of non-GHG pollutants. These sources are referred to as “anyway sources.” Step 2 of the Tailoring Rule, which began on July 1, 2011, applied the PSD and title V permitting requirements under the CAA to sources that were classified as major, and, thus, required to obtain a permit, based solely on their potential GHG emissions and to modifications of otherwise major sources that required a PSD permit because they increased only GHG above applicable levels in the EPA regulations.

On July 12, 2012, the EPA promulgated the final “Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule Step 3 and GHG Plantwide Applicability Limits” (GHG Tailoring Rule Step 3 and GHG PALs).¹ 77 FR 41051. In the Tailoring Rule Step 3 portion of this rule, the EPA decided against further phase in of the PSD and Title V requirements to apply to sources emitting lower levels of greenhouse gas emissions. Thus, the thresholds for determining PSD applicability based on emission of greenhouse gases remained the same as established in Step 2 of the Tailoring Rule. The Step 3 portions of the EPA’s July 12, 2012 final rule are not relevant to today’s proposed action on the Arkansas SIP revision.

The GHG PALs portion of the July 12, 2012 final rule promulgated revisions to the EPA regulations under 40 CFR part 52 for establishing PALs for GHG emissions. For a full discussion of the EPA’s rationale for the GHG PALs provisions, see the notice of final rulemaking at 77 FR 41051. A PAL establishes a site-specific plantwide emission level for a

¹ For a complete history of EPA’s rulemakings related to GHG emissions please review the following final actions: “Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act.” 74 FR 66496 (December 15, 2009).

“Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs.” 75 FR 17004 (April 2, 2010).

Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule.” 75 FR 25324 (May 7, 2010).

Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule.” 75 FR 31514 (June 3, 2010).

pollutant that allows the source to make changes at the facility without triggering the requirements of the PSD program, provided that emissions do not exceed the PAL level. Under the EPA's interpretation of the federal PAL provisions, such PALs are already available under PSD for non-GHG pollutants and for GHGs on a mass basis, and the EPA revised the PAL regulations to allow for GHG PALs to be established on a carbon dioxide equivalent (CO₂e) basis as well. See 77 FR 41052. The EPA finalized these revisions in an effort to streamline federal and SIP PSD permitting programs by allowing sources and permitting authorities to address GHGs using a PAL in a manner similar to the use of PALs for non-GHG pollutants. See 77 FR 41051, 41052.

B. Summary of the January 7, 2014 Arkansas SIP Submittal

On April 2, 2013, the EPA approved a revision to the Arkansas SIP providing the State of Arkansas the authority to regulate and permit emissions of GHGs under the Arkansas PSD Program and simultaneously rescinded the GHG PSD FIP for Arkansas. See 78 FR 19596. Arkansas submitted on January 7, 2014, regulations specific to the Arkansas GHG PSD permitting program for approval by the EPA into the Arkansas SIP. The January 7, 2014, SIP revision submittal includes the PSD permitting provisions that were adopted on June 28, 2013, at the Arkansas Pollution Control and Ecology Commission's ("Commission") Regulation Number 19, Regulations of the Arkansas Plan of Implementation for Air Pollution Control (hereinafter Regulation 19 at 19.904(A)(1) and (G)(1) that provide the Arkansas Department of Environmental Quality (ADEQ) the ability to issue GHG PSD PALs consistent with the "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule Step 3 and GHG Plantwide Applicability Limits Final Rule" (77 FR 41051). The January 7, 2014 submittal also included a non-substantive revision to the Regulation 19.904(E)(3) to correct a reference to federal air quality models for PSD permitting. Today's proposal and the accompanying

Technical Support Document (TSD) present our rationale for approving these regulations as meeting the minimum federal requirements for the adoption and implementation of the PSD SIP permitting programs.

C. Ministerial Changes to the CFR

We are proposing ministerial changes to 40 CFR 52.170(e) and 40 CFR 52.172(b) which reflect that deficiencies identified in in our partial disapproval of ADEQ's December 17, 2007 and March 28, 2008 SIP submittals for the 1997 8-hour ozone NAAQS have been adequately addressed by the State. We are proposing the changes because we fully approved the revisions to the Arkansas PSD program providing the authority to regulate and permit emissions of GHGs on April 2, 2013 (78 FR 19596). As a result of our full approval of the Arkansas PSD program for GHGs, the partial disapproval is no longer applicable.

We are also proposing a ministerial change to 40 CFR 52.181(a) to show that the EPA approved a revision to the Arkansas PSD program on April 2, 2013, to provide the state the authority to regulate and permit GHGs. See 78 FR 19596.

II. The EPA's Evaluation

The EPA's most recent approval to the Arkansas PSD program was on March 4, 2015, where we updated our approval of the Arkansas PSD program to include the December 1, 2014 submitted revisions to provide the ADEQ the authority to regulate and permit emissions of fine particulate matter and its precursors consistent with federal requirements. Our March 4, 2015 final action did not address the pending submittal regarding the GHG PSD PALs submitted on January 7, 2014. See 80 FR 11573.

The State of Arkansas has adopted and submitted one revision to the PSD program on January 7, 2014, affecting Regulation 19.904 – Adoption of Regulations, Sections 19.904(A)(1), (E)(3), and (G)(1). The revisions to Regulation 19.904(A)(1) and (G)(1) have been submitted to provide for the issuance of GHG PSD PAL permits through the incorporation by reference of the federal regulations at 40 CFR 52.21(aa) and the adoption of revisions to the definition of “Greenhouse gases” that are consistent with the requirements promulgated by EPA in our final rule on July 12, 2012, titled “Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule Step 3 and GHG Plantwide Applicability Limits.” See 77 FR 41501. In addition, the revision to Regulation 19.904(E)(3) updates a reference to the federal air quality models used for PSD permitting.

The ADEQ has adopted and submitted regulations that are consistent with the federal regulations for the permitting of GHG-emitting sources through a GHG PSD PAL effective as of August 13, 2012. The detailed analysis in our TSD demonstrates that the revisions to Regulation 19.904(A)(1) incorporate by reference the GHG PSD PAL provisions at 40 CFR 52.21(aa), effective on August 13, 2012. The revisions to Regulation 19.904(G)(1) revise the Arkansas PSD SIP provisions for GHG PSD permitting to amend the definition of “GHGs” to mirror the provisions promulgated by the EPA on July 12, 2012, effective on August 13, 2012, for the issuance of GHG PSD PALs.

On June 23, 2014, the United States Supreme Court, in *Utility Air Regulatory Group v. Environmental Protection Agency*,² issued a decision addressing the application of PSD permitting requirements to GHG emissions. The Supreme Court said that the EPA may not treat GHGs as an air pollutant for purposes of determining whether a source is a major source (or

² 134 S.Ct. 2427 (2014).

modification thereof) required to obtain a PSD permit. The Court also said that the EPA could continue to require that PSD permits, otherwise required based on emissions of pollutants other than GHGs, contain limitations on GHG emissions based on the application of Best Available Control Technology (BACT). The Supreme Court decision effectively upheld PSD permitting requirements for GHG emissions under Step 1 of the Tailoring Rule for "anyway sources" and invalidated PSD permitting requirements for Step 2 sources.

In accordance with the Supreme Court decision, on April 10, 2015, the U.S. Court of Appeals for the District of Columbia Circuit (the D.C. Circuit) issued an amended judgment vacating the regulations that implemented Step 2 of the Tailoring Rule, but not the regulations that implement Step 1 of the Tailoring Rule. A copy of the judgment is included in the docket to this rulemaking.³ The amended judgment preserves, without the need for additional rulemaking by the EPA, the application of the Best Available Control Technology (BACT) requirement to GHG emissions from sources that are required to obtain a PSD permit based on emissions of pollutants other than GHGs ("anyway" sources). The D.C. Circuit's judgment vacated the regulations at issue in the litigation, including 40 CFR 51.166(b)(48)(v), "to the extent they require a stationary source to obtain a PSD permit if greenhouse gases are the only pollutant (i) that the source emits or has the potential to emit above the applicable major source thresholds, or (ii) for which there is a significant emissions increase from a modification."

The EPA may need to take additional steps to revise federal PSD rules in light of the Supreme Court decision and recent D.C. Circuit judgment. In addition, the EPA anticipates that many states will revise their existing SIP-approved PSD programs. The EPA is not expecting states to have revised their existing PSD program regulations at this juncture. However, the

³ Original case is *Coalition for Responsible Regulation v. EPA*, D.C. Cir., No. 09-1322, 06/26/20, judgment entered for No. 09-1322 on 04/10/2015.

EPA is evaluating PSD program submissions to assure that the state's program correctly addresses GHGs consistent with both decisions.

Arkansas's existing approved SIP contains the greenhouse gas permitting requirements required under 40 CFR 51.166, as amended in the Tailoring Rule. As a result, the State's SIP-approved PSD permitting program continues to require that PSD permits (otherwise required based on emissions of pollutants other than GHGs) contain limitations on GHG emissions based on the application of BACT when sources emit or increase greenhouse gases in the amount of 75,000 tons per year (tpy), measured as carbon dioxide equivalent. Although the SIP-approved Arkansas PSD permitting program may also currently contain provisions that are no longer necessary in light of the D.C. Circuit's judgment or the Supreme Court decision, this does not prevent the EPA from approving the submission addressed in this rule. Arkansas's January 7, 2014 SIP submission does not add any greenhouse gas permitting requirements that are inconsistent with either decision.

Likewise, this revision does add to the Arkansas SIP elements of the EPA's July 12, 2012 rule implementing Step 3 of the phase in of PSD permitting requirements for greenhouse gases described in the Tailoring Rule, which became effective on August 13, 2012. Specifically, the incorporation of the Step 3 rule provisions will allow GHG-emitting sources to obtain PALs for their GHG emissions on a CO₂e basis. The GHG PAL provisions, as currently written, include some provisions that may no longer be appropriate in light of both the D.C. Circuit judgment and the Supreme Court decision. Since the Supreme Court has determined that sources and modifications may not be defined as "major" solely on the basis of the level of greenhouse gases emitted or increased, PALs for greenhouse gases may no longer have value in some situations where a source might have triggered PSD based on greenhouse gas emissions alone. However,

PALs for GHGs may still have a role to play in determining whether a modification that triggers PSD for a pollutant other than greenhouse gases should also be subject to BACT for greenhouse gases. These provisions, like the other GHG provisions discussed previously, may be revised at some future time. However, these provisions do not add new requirements for sources or modifications that only emit or increase greenhouse gases above the major source threshold or the 75,000 tpy greenhouse gas level in section 52.21(b)(49)(iv). Rather, the PALs provisions provide increased flexibility to sources that wish to address their GHG emissions in a PAL. Since this flexibility may still be valuable to sources in at least one context described above, we believe that it is appropriate to approve these provisions into the Arkansas SIP at this juncture.

In a related matter, on July 12, 2013 the D.C. Circuit, in *Center for Biological Diversity v. EPA*,⁴ vacated the provisions of the Biomass Deferral, which had delayed (for three years) the applicability of PSD and title V requirements to biogenic CO₂ emissions. While the opportunity to seek rehearing of this D.C. Circuit decision remains open and thus the ultimate disposition of the Federal regulations implementing the Biomass Deferral has not yet been determined, the three-year deferral expired on July 21, 2014. Consistent with 40 CFR 51.166(b)(48)(ii)(a), the provision in the approved Arkansas PSD SIP at Regulation 19.904(G)(2)(b) implementing the Biomass Deferral does not apply after the July 21, 2014 date contained therein. Thus, this prior approval does not conflict with the D.C. Circuit's decision.

ADEQ has also adopted and submitted a revision to the SIP-approved provisions at Regulation 19.904(E)(3) to update the reference to the federal air quality models to be used for PSD permitting. The reference now reads 40 CFR 52.21(l)(2) as opposed to the prior incorrect

⁴ 722 F.3d 401 (D.C. Cir. 2013).

reference to 40 CFR 52.21(2). The EPA proposes to find that the ADEQ has correctly revised the Arkansas PSD program to reference federal requirements.

III. Proposed Action

The EPA is proposing to approve the January 7, 2014 submitted revisions to the Arkansas PSD Permitting Program at Regulation 19.904(A)(1), (E)(3), and (G)(1) into the Arkansas SIP. The EPA is proposing to determine that the January 7, 2014 revision is approvable because the submitted rules are adopted and submitted in accordance with the CAA and are consistent with the EPA's regulations regarding PSD permitting for emissions of GHGs. Therefore, the EPA proposes to approve the following as a revision to the Arkansas PSD SIP:

- Substantive revisions to Regulation 19.904(A)(1) incorporating by reference the federal GHG PSD PAL permitting provisions,
- Revisions to Regulation 19.904(E)(3) to update the reference to federal PSD air quality models at 40 CFR 52.21(l)(2), and
- Substantive revisions to Regulation 19.904(G)(1) establishing the requirements for GHG PSD PAL permits consistent with federal requirements.

The EPA is also proposing ministerial changes to 40 CFR 52.170(e) and 40 CFR 52.172(b) which reflect that deficiencies identified in our partial disapproval of the December 17, 2007 and March 28, 2008 Arkansas SIP submittals for the 1997 8-hour ozone NAAQS were addressed by our approval of Arkansas PSD program revisions which provide the authority to regulate and permit emissions of GHGs on April 2, 2013 (78 FR 19596). We are also proposing a ministerial change to 40 CFR 52.181(a) to reflect that the EPA approved a revision to the PSD

program for the authority to regulate and permit emissions of GHGs on April 2, 2013 (78 FR 19596).

The EPA is proposing these actions under section 110 and part C of the Act, and for the reasons stated above.

IV. Incorporation by Reference

In this rule, the EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with the requirements of 1 CFR 51.5, the EPA is proposing to incorporate by reference the revisions to the Arkansas PSD Program at Regulation 19.904 discussed in section II of this preamble. The EPA has made, and will continue to make, these documents generally available electronically through www.regulations.gov and/or in hard copy at the appropriate EPA office (see the **ADDRESSES** section of this preamble for more information).

V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely proposes to approve state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule is not proposed to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that tribe has jurisdiction. In those areas of Indian country, the proposed rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds, and Incorporation by reference.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: April 17, 2015.

Ron Curry,

Regional Administrator, Region 6.

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